82-152

No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHNNIE TAYLOR HALL,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED

I. Whether Petitioner's guilty plea should have been accepted without questioning him on the record to determine that he understood he had the right not to testify.

II. Whether Petitioner's guilty plea should have been accepted without any on-the-record explanation of the charges.

III. Whether Petitioner's guilty plea should have been accepted without any showing on the record that he understood the maximum authorized sentence which could be imposed upon conviction.

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OPINION BELOW

The only opinion below was unreported in the Court of Special Appeals of Maryland, and was docketed as Johnnie Taylor Hall v. State of Maryland, No. 937, September Term, 1981. That opinion was filed on February 26, 1982, and is printed in the appendix.

Thereafter, no opinion was given by the Court of Appeals of Maryland, which is the state court of last resort, in denying certiorari on June 4, 1982.

JURISDICTION

The judgment sought to be reviewed was entered on June 4, 1982, when the Court of Appeals of Maryland denied the petition for writ of certiorari filed by Petitioner. Jurisdiction is conferred upon this Court by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in part:

> No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...

Section 1 to the Fourteenth Amendment to the Constitution of the United States provides in part:

> ...nor shall any State deprive any person of life, liberty or property without due process of law ...

STATEMENT OF THE CASE

On July 20, 1981, Petitioner, as part of a plea bargain, pleaded guilty to one count of driving while intoxicated in violation of Maryland law.

At the hearing during which the plea was entered, Petitioner was advised

that he was giving up the right to testify. However, no one advised him that he had the right not to testify.

Two charges were pending against Petitioner, namely, driving while intoxicated and driving over the posted speed limit. However, no explanation of the charges was made on the record. The only interchange was:

> Q. Do you understand the charges against you today?
>
> A. Yes, I do.

A. 5.

Nor was any inquiry made as to whether Petitioner understood the maximum authorized sentence which could be imposed. In its opinion, the Court of Special Appeals stated: "We agree ... that the court erred in not advising the appellant of the maximum possible sentence." A. 6.

At the conclusion of the hearing, Petitioner's guilty plea was accepted, and he was sentenced to one year of imprisonment with all but sixty days suspended, fined $250.00 and placed on five years supervised probation. A timely order for appeal was filed in the Court of Special Appeals of Maryland on August 19, 1981.

Since Petitioner had pleaded guilty in the trial court, the questions presented first were raised on appeal. A. 2. The first question presented here (self-incrimination) was decided on the basis of the federal constitution. A. 7-8. The second (nature of the charge) was decided on the basis of Henderson v. Morgan, 426 U.S. 637

(1976).[1] A. 4-5. The third (maximum possible sentence) was decided on the basis that "the plea bargain did include the maximum possible sentence," A. 6, a conclusion which Petitioner claims should not constitutionally be permitted to substitute for ascertaining on the record that Petitioner was advised of and understood the maximum possible sentence.

The Court of Special Appeals affirmed the conviction in an unreported opinion. A. 1, et seq. Petitioner then filed a timely Petition For Writ of Certiorari with the Court of Appeals of Maryland, which was denied on June 4, 1982. A. 9.

---

[1] Petitioner claimed a violation of Maryland Rule 731 c which required "questioning the defendant on the record to determine that the plea is made voluntarily, with understanding of the nature of the charge ..." In its opinion, the Court of Special Appeals relied upon Henderson v. Morgan, supra.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW IS PART OF A WIDESPREAD CONFLICT AMONG BOTH STATE AND FEDERAL COURTS AS TO WHETHER THE RECORD MUST SHOW THAT AN ACCUSED UNDERSTOOD HE HAD THE RIGHT NOT TO TESTIFY BEFORE ACCEPTANCE OF HIS GUILTY PLEA.

The record is silent as to whether Petitioner understood that he had the right not to testify. The only relevant inquiry was the following:

> By Defense Counsel:
>
> Q. You are also giving up the right to testify. If you were not to testify the Court or the jury, the finder of fact, would not infer you were guilty from the fact you did not testify. Do you understand that?
>
> A. Right.

A. 7.

Nowhere does the record show that Petitioner was told he had the right not to testify. At most, the surrender of this right was implied by defense counsel's statement that the finder of fact

would not infer guilt if Petitioner did not testify.

In Boykin v. Alabama, 395 U.S. 238 (1969), this Court overturned a conviction, holding that a waiver of federal rights, including the right against self-incrimination, cannot be presumed from a silent record. Id. at 243. In Henderson v. Morgan, 426 U.S. 637, 645 N. 13 (1976), the Court noted that a plea may be involuntary "because the accused does not understand the nature of the constitutional protections that he is waiving ..." The issue here is whether the record must show that an accused entering a guilty plea was told he had the right not to testify and understood it. State and federal courts are divided on this issue.

In certain states Boykin has been read to require a specific on-the-record

enumeration and waiver of the defendant's constitutional rights. For example, the Supreme Court of California has stated that, under Boykin,

> ... each of the three rights mentioned -- self-incrimination, confrontation, and jury trial -- must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea... This does not require the recitation of a formula by rote or the spelling out of every detail by the trial court. It does mean that the record must contain on its face direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant. Because mere inference is no longer sufficient, the presence of an attorney can not alone satisfy these requirements.

In Re Tahl, 1 Cal. 3d 122, 131, 460 P.2d 449, 456 (1969).

Similar conclusions have been reached in Maleck v. State, 265 Ind. 604, 606, 358 N.E.2d 116, 118 (1976) (trial judge must "fully advise a defendant of his rights at the time a guilty plea is tendered, or have a record before him which demonstrates a full advisement"); Nachtigall v. Erickson, 85 S.D. 122, 128, 178 N.W. 2d 198, 201 (1970) ("... plea of guilty cannot stand unless the record in some manner indicates a free and intelligent waiver of the three constitutional rights mentioned in Boykin ... South Dakota judges can no longer assume that an accused represented by counsel has been informed of such matters and the judge must actively participate by 'canvassing the matter with the accused.' A silent record is not sufficient."); Brainard v. State, 222 N.W. 2d 711, 717 (Iowa 1974)

("...judge must by personal colloquy inform the defendant of his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers, and determine that he understands he waives these rights by pleading guilty.").

Other states, including Maryland, have disagreed. E.g., Hall v. State, A. 1, et seq.; Davis v. State, 278 Md. 103, 114, 361 A.2d 113, 119 (1976) (Boykin does not require trial courts "to specifically enumerate certain rights ... before accepting a defendant's guilty plea ..."); State v. Turner, 186 Neb. 424, 425, 183 N.W.2d 763, 765 (1971) ("...item-by-item review of constitutional rights on a guilty plea is a strained and too extreme construction" of Boykin); LoPiano v. State, 270 S.C. 563, 568, 243 S.E. 2d

448, 450 (1978) (Boykin does not "require that the trial judge direct the defendant's attention to each and every constitutional right and obtain a separate waiver of each."); State v. Colyer, 98 Idaho 32, 35, 557 P.2d 626, 629 (1976) (enumeration of rights not required).

The conflict among state courts of last resort has carried over into the federal arena. In United States v. Escandar, 465 F.2d 438, 441 (5th Cir. 1972), the court stated that before a plea of guilty can be accepted,

> the Trial Judge must personally address the Defendant, question him explicitly, explain the Constitutional rights involved and satisfy himself that the accused has "a full understanding of what his plea of guilty connotes and of its consequences." (citation omitted).

Conversely, in Stinson v. Turner, 473 F.2d 913, 915 (10th Cir. 1975), the

court stated that Boykin imposed no requirement that the three rights at issue be enumerated.

The issue is of obvious importance, and in view of conflicting state and federal court decisions, is worthy of review.

II. THE OPINION BELOW CONFLICTS WITH HIGH COURTS OF OTHER STATES REQUIRING A SHOWING ON THE RECORD THAT AN ACCUSED UNDERSTAND THE NATURE OF THE CHARGES AGAINST HIM BEFORE ACCEPTANCE OF HIS GUILTY PLEA.

It is undisputed that the trial court failed to ask Petitioner any questions on the record to determine that he understood the nature of the charges against him. The only inquiry in this regard was by defense counsel:

> Q. Do you understand the charges against you today?
>
> A. Yes, I do.

A. 5. No further efforts were made to explain or even enumerate the charges to Petitioner.

In Henderson v. Morgan, this Court, in reviewing a guilty plea, stated:

> ...such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea couldn't be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." (citation omitted).

426 U.S. at 645. The Court then stated:

> (Even without an express representation) it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

426 U.S. at 647. Whether this "presumption" satisfies the requirement that an accused receive "real notice" of the charge is unclear.

The Court of Special Appeals relied upon the foregoing "presumption" in affirming Petitioner's conviction. However, contrary to the ruling below, the Supreme Court of Pennsylvania has held:

> ...a valid guilty plea may not be accepted in the absence of a demonstration of defendant's understanding of the charges... In order to demonstrate that a defendant possesses such understanding, he certainly must be told more than just that he has been charged with murder or robbery, for example... Thus, for an examination to demonstrate a defendant's understanding of the charge, the record must disclose that the elements of the crime or crimes charged were outlined in understandable terms.

Commonwealth v. Ingram, 455 Pa. 198, 203, 316 A.2d 77, 80 (1974); accord, In Re Tahl, 1 Cal. 3d 122, 131, 460 P.2d 449, 456 (1969), quoted supra at 8. Cf. State v. Williams, 404 A.2d 814, 820 (R.I. 1979) (defense counsel's certification that defendant understood charges held sufficient).

Because there is a conflict between states on this issue, review is warranted.

III. THE OPINION BELOW CONFLICTS WITH OTHER STATE AND FEDERAL DECISIONS WHICH REQUIRE AN ON-THE-RECORD SHOWING THAT AN ACCUSED UNDERSTAND THE MAXIMUM POSSIBLE SENTENCE BEFORE ACCEPTANCE OF HIS GUILTY PLEA.

The Court of Special Appeals agreed that the trial "court erred in not advising ... [Petitioner] ... of the maximum possible sentence." A. 6. However, the court noted that the plea bargain, which was stated in open court prior to any questioning of Petitioner, "did include the maximum possible sentence." A. 6. Therefore, the court concluded that the conviction should be affirmed.

It is undisputed that whatever the plea bargain was stated to be, there is nothing on the record to show that Petitioner understood the maximum possible

sentence. Under Maryland law, this was "a fine of not more than $1,000 or imprisonment for not more than one year or both." Md. Ann. Code, TR § 27-101(i) 1977. In upholding the conviction, the Court of Special Appeals necessarily concluded that such an on-the-record showing was not required. This conclusion conflicts with numerous other state and federal court decisions.

In Boykin v. Alabama, this Court stated that trial judges should demonstrate "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." 395 U.S. 238, 243-244. Although the Court did not expressly state that an accused had to be informed of the maximum possible sentence, cf. 395 U.S. at 245 N.7, lower courts have imposed

such a requirement. E.g., Cardenas v. Meacham, 545 P.2d 632, 633-34 (Wyo. 1976) ("There must be a record showing that the judge, in personally addressing the defendant, informed him of the maximum penalty for any and all crimes for which sentence is to be imposed in order that the court may determine the defendant had an 'understanding of the nature of the charge and the consequences of the (his) plea.'"); cf. In Re Guilty Plea Cases, 395 Mich. 96, 235 N.W. 2d 132 (1975) and State v. Mackey, 553 S.W. 2d 337 (Tenn. 1977).

The Delaware Supreme Court explained the rationale for this record requirement in Wells v. State, 396 A.2d 161 (Del. 1978):

> The maximum possible sentence provided by law for conviction of the offense charged is the most important "consequence of the plea." Accordingly, it must be spelled out clearly and accurately upon the record by the Trial Judge

> in order to assure that the waiver of important constitutional rights, which occurs when the defendant enters a guilty plea, is made "knowingly and intelligently."

396 A.2d at 162.

Lower federal courts also have subscribed to this rule. Lewellyn v. Wainwright, 593 F.2d 15, 17 (5th Cir. 1979) (because petitioner was ignorant of maximum authorized sentence, plea was found involuntary and invalid under the due process clause); cf. Hunter v. Fogg, 616 F.2d 55, 61 (2d Cir. 1980) ("We therefore conclude that the constitutional requirements of a state court guilty plea include informing a defendant of a mandatory minimum sentence (the lowest possible maximum)...").

Because the lower court's opinion conflicts with decisions in both state and federal courts, the issue merits review.

CONCLUSION

By reason of the foregoing, the Court is urged to grant this petition.

Respectfully submitted,

Lawrence S. Greenwald
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Rothman, Hoffberger
& Hollander
Attorney for Petitioner

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 937

September Term, 1981

JOHNNIE TAYLOR HALL

v.

STATE OF MARYLAND

Morton
Liss
Weant,

JJ.

Per Curiam

Filed: February 26, 1982

On July 20, 1981, Johnnie Taylor Hall, the appellant, was convicted on a guilty plea in the Criminal Court of Baltimore (Pines, J.), of driving while intoxicated. At the conclusion of the trial he was committed to the custody of the Division of Correction for one year and fined $250.00. All but sixty days of the sentence was suspended in favor of a five year probation. Now on appeal he contends the court erred in accepting the guilty plea because it did not:

1. insure he understood the nature of the charge
2. advise him of the maximum possible sentence
3. advise him of his right against self-incrimination

The agreed statement of facts presented by the State shows that at about 7:10 P.M. on Tuesday, March 3, 1981, the police stopped the appellant

who was driving sixty-three miles per hour in a thirty-five mile per hour zone. The police also detected signs that the appellant was intoxicated.

At the commencement of the proceedings, the State advised the court that:

> "The defendant is charged with driving while intoxicated. Calling the A Charge, Your Honor, and if the guilty plea to the A charge is acceptable by the Court the State will recommend one year, all but thirty weekends in the Baltimore City Jail suspended, a total of sixty days. After jail time is served the defendant is to be placed on supervised probation for a period of five years."

Thereafter the appellant was questioned by his trial counsel regarding the guilty plea and the State presented the agreed statement of facts. Then the court accepted the plea and imposed the sentence.

I. Understanding the nature of charge

The appellant first contends that the court failed to comply with the requirements of Maryland Rule 731 c. because it did not insure that he understood the nature of the charge against him. While the appellant is correct in stating that the court did not specifically ask him such questions, we note that the Supreme Court of the United States in Henderson v. Morgan, 426 U.S. 637, 647 (1976), observed:

> "Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit."

In the instant case the appellant during his voir dire by his trial counsel concerning his guilty plea testified:

> "Q. Do you understand the charges against you today?
>
> A. Yes I do."

Thus for the same reasons as set forth in Henderson v. Morgan, supra, we do not think the court erred in concluding that the appellant understood the nature of the charge against him. Therefore the appellant's contention is not grounds for setting aside his conviction.

II. Maximum possible sentence

Secondly the appellant, relying on English v. State, 16 Md. App. 439 (1973), contends that the court erred in not ascertaining that he knew the maximum possible sentence that could have been imposed for the offense to which he

was entering a guilty plea. In English v. State, supra, we said at 16 Md. App. 442:

> "The record must also clearly show that the accused knew the length of the maximum sentence authorized to be imposed upon conviction of the offense to which he is pleading."

We agree with the appellant that the court erred in not advising the appellant of the maximum possible sentence. On the other hand we note that the plea bargain stated at the beginning of the proceeding indicated the maximum sentence would be one year.

Transportation Article Section 27-101 (i) provides for a sentence of one year and $1,000.00 fine for a first time offender for driving while intoxicated. Thus the plea bargain did include the maximum possible sentence. While under different circumstances we may have reached a different conclusion,

we consider in the instant case that the appellant's contention is not grounds for setting aside his conviction.

III. Self-incrimination

Lastly the appellant contends that he was not advised of his right against self-incrimination. Despite this assertion on appeal, we note that the appellant testified on voir dire concerning his guilty plea as follows:

> "Q. You are also giving up the right to testify. If you were not to testify the Court or the jury, the finder of fact, would not infer you were guilty from the fact you did not testify. Do you understand that?
>
> A. Right."

While the question could have been more artfully phrased, we consider that it did convey the essential operative characteristics of the right against self-incrimination and the question did elicit an affirmative response.

As the Court of Appeals said in Davis v. State, 278 Md. 103, 114 (1976):

> "... [W]e conclude that Boykin [v. Alabama, 395 U.S. 238 (1969)] does not stand for the proposition that the due process clause requires state trial courts to specifically enumerate certain rights, or go through any particular litany, before accepting a defendant's guilty plea; rather, we think Boykin merely holds that the record must affirmatively disclose that the accused entered his confession of guilt voluntarily and understandingly."

We consider that the proceedings in the instant case fell within the parameters of Davis v. State, supra. Therefore we do not find the appellant's contention is grounds for setting aside his conviction.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

JOHNNIE TAYLOR HALL	*	IN THE
v.	*	COURT OF APPEALS
STATE OF MARYLAND	*	OF MARYLAND
	*	PETITION DOCKET NO. 67
	*	SEPTEMBER TERM, 1982
	*	(No. 937, September Term,
	*	1981 Court of Special
	*	APPEALS)

* * * * * * * *

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: June 4, 1982.

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OCTOBER TERM, 1982

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v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Before Petitioner's guilty plea was accepted, did the record reflect Petitioner's understanding of the privilege against self-incrimination, the consequences of the plea, and the nature of the charge?

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NO. 82-152

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHNNIE TAYLOR HALL,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENT

This Brief of Respondent in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Court dated September 9, 1982.

OPINIONS BELOW

The Order of the Court of Appeals of Maryland of June 4, 1982, denying Petitioner's Petition for Writ of Certiorari

to the Court of Special Appeals of Maryland is appended to the Petition at A.9. The Opinion of the Court of Special Appeals of Maryland, Hall v. State, No. 937, Sept. Term, 1981 (Md. App., unreported per curiam opinion filed Feb. 26, 1982), is appended to the Petition at A.1 - A.8.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

United States Constitution:

[Amendment V]

[Rights of Accused in Criminal Proceedings]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Maryland Rules of Procedure

Rule 731. Pleas.

c. Plea of Guilty.

The court may not accept a plea of guilty without first questioning the defendant on the record to determine that the plea is made voluntarily, with understanding of the nature of the charge and the consequences of the plea. The court may accept the plea of guilty even though the defendant does not admit that he is in fact guilty if the court is satisfied that there is a factual basis for the plea. If the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty.

Rule 1085. Scope of Review -- Limited to Questions Decided by Lower Court

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower

court may be raised and decided in this Court whether or not raised and decided in the lower court.

STATEMENT OF THE CASE

On July 20, 1981, Johnnie Taylor Hall, Petitioner, in the Criminal Court of Baltimore, Maryland (Pines, J.), pleaded guilty to and was found guilty of driving while intoxicated. The pertinent portions of the transcript of the guilty plea hearing will be supplied in the Argument, infra. Petitioner was sentenced to one year imprisonment with all but 60 days suspended.

On direct appeal, Petitioner alleged that the hearing judge improperly accepted his guilty plea under Md. Rule 731c because Petitioner (1) did not understand the nature of the charge, (2) was not informed of the maximum sentence, and (3) was not informed of the waiver of his Fifth Amendment rights. Petitioner's conviction was affirmed by the Court of Special Appeals of Maryland. Hall v. State, No. 937, Sept. Term, 1981 (Md. App., unreported per curiam opinion filed Feb. 26, 1982) (Petition A.1 - A.8).

Petitioner's Petition for Writ of Certiorari, in which the same issues were

raised, was denied. Hall v. State, Pet. Dkt. No. 67, Sept. Term, 1982 (Md., Order by Murphy, C.J., filed June 4, 1982) (Petition A.9).

ARGUMENT

PETITIONER'S GUILTY PLEA WAS PROPERLY ACCEPTED WHERE THE RECORD REFLECTS HIS UNDERSTANDING OF THE PRIVILEGE AGAINST SELF-INCRIMINATION, THE CONSEQUENCES OF THE PLEA, AND THE NATURE OF THE CHARGE. THE STANDARDS SET FORTH BY THIS COURT DO NOT MANDATE AN EXPLANATION OF THE ELEMENTS OF THE CRIME BEFORE THE NATURE OF THE CHARGE CAN BE UNDERSTOOD, THE DECISIONS FROM SOME OTHER JURISDICTIONS NOTWITHSTANDING.

Maryland Rule 731c mandates that a hearing judge "may not accept a plea of guilty without first questioning the defendant on the record to determine that the plea is made voluntarily, with understanding of the nature of the charge and the consequences of the plea." Petitioner argues that, in view of the decisions of other jurisdictions requiring an on-the-record showing that a defendant must understand the privilege against self-incrimination, the nature of the charge, and the maximum possible sentence,

the hearing judge did not comply with this Court's decisions in Boykin v. Alabama, 395 U.S. 23 (1969), and Henderson v. Morgan, 426 U.S. 637 (1976), and thus inferably with Md. Rule 731c, before accepting Petitioner's guilty plea.

Petitioner's conclusion that the record does not reflect an understanding of the maximum sentence and the privilege against self-incrimination is incorrect. Nor did the Court of Special Appeals of Maryland misunderstand the requirements in holding that, under the facts of this case, the record was sufficient.

The State agreed that, in return for the guilty plea, it would recommend

> "one year, all but thirty weekends in the Baltimore City Jail suspended, a total of sixty days. After jail time is served the defendant is to be placed on supervised probation for a period of five years and the Department of Parole and Probation is to determine whether or not he needs further alcoholic treatment, counselling.
>
> When I say further, according to his attorney he has just completed a program given by the Motor Vehicle Administration. In addition to that, he will have to pay a fine of $250 as well as Court

> costs, and if the plea is accepted the State will nol pros the speeding charge."

Because the recommendation was accepted and no offer to withdraw the guilty plea was extended beforehand in the event that the recommendation would not be accepted, Petitioner was, in effect, informed and understood -- because he acknowledged understanding the bargain -- that the recommendation reflected the maximum exposure he could receive in exchange for the plea and that he would receive the contemplated benefit. See generally Bryant v. State, 47 Md. App. 551 (1981). Any assertion to the contrary was waived by Petitioner's failure to ask to withdraw his guilty plea or to be resentenced by a different judge. Barnhart v. State, 34 Md. App. 632, 634-35 (1977); Md. Rule 1085.

The hearing judge could also determine that Petitioner knowingly and voluntarily waived his Fifth Amendment rights where Petitioner acknowledged understanding the following statement:

> "You are also giving up the right to testify. If you were not to testify the Court or the jury, the finder of fact, would not infer you were guilty from the fact you did not testify."

This statement surely conveys the same information as the statement, "Do you understand that you have the right not to testify?"

Petitioner's argument is thus reduced to a contention that the record must reflect an explanation of the elements of the crime before the guilty plea could have been made with an understanding of the nature of the charge. While Respondent concedes that other jurisdictions have such a requirement, see State v. Priet, 289 Md. 267, 284-85 (1981), it is clear that such a requirement is not required by this Court.

> "Instead of testing the voluntariness of a plea by determining whether a ritualistic litany of the formal legal elements of an offense was read to the defendant, . . . the court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused."

Henderson v. Morgan, 426 U.S. at 644.

This Court observed in Henderson v. Morgan, 426 U.S. at 647 n. 18, that "[t]here is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every

element of the offense; we assume it does not." This assumption is inferably based on an earlier observation in McCarthy v. United States, 394 U.S. 459, 467 n. 20 (1969), that:

> "The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any general guidelines other than those expressed in the Rule itself . . . . In all such inquiries, '[m]atters of reality, and not mere ritual, should be controlling.' Kennedy v. United States, 397 F.2d 16, 17 (C.A. 6th Cir. 1968)."

In McCarthy, 394 U.S. at 467, this Court also held:

> "[I]n addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea . . . . Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" (Emphasis added.)

McCarthy thus makes clear that knowledge of

the elements of the crime charged, i.e., "the relation between the law and the acts the defendant admits having committed," is important only in determining whether there is a factual basis for the plea, an issue not present in this case, and not in determining whether a defendant understands the nature of the charge. To determine whether a defendant understood the nature of the charge, a case by case analysis of the totality of the circumstances, and not a recitation of elements, is mandated.

Thus, in Henderson v. Morgan, habeas corpus relief was granted where the record revealed that Morgan, possessing "unusually low mental capacity," was not informed by his attorney that intent was an element of second degree murder, the charge to which Morgan pled guilty though the indictment was couched in terms of first degree murder. 426 U.S. at 645-47. In Smith v. O'Grady, 312 U.S. 329 (1941), this Court held that Smith would be entitled to habeas corpus relief if he could prove his allegation that he, who had had no education or previous court experience, was, inter alia, denied appointment of counsel and a copy of the charge to which he was pleading guilty. Finally, in Kadwell v. United

States, 315 F.2d 667 (9th Cir. 1963), it was held that Kadwell's motion to withdraw a guilty plea was erroneously denied where

> "[a]ppointed counsel, apparently selected from those available in the courtroom at the time of arraignment, presumably had no prior knowledge of appellant, of the charge against him, or of the legal and factual issues involved. The period of consultation and opportunity for deliberation were brief at best. Appellant was not informed by the court of either the nature of the accusation or the consequences of his plea. Appellant asserts that he in fact lacked that knowledge. . . ." 315 F.2d at 671.

Unlike the blatantly deplorable situations in Henderson v. Morgan, Smith v. O'Grady, and Kadwell, the totality of the circumstances reveals that Petitioner understood the nature of the charge to which he pled guilty such that the guilty plea was voluntarily entered. Petitioner was 52 years old, had a ninth-grade education, and was literate. He was represented by counsel at the hearing. Petitioner acknowledged understanding the charge against him -- indeed a simple charge whose name states all the elements -- and the bargain struck with the State wherein the charge to which the plea was entered was set forth. See

generally State v. Priet, 289 Md. at 288.

The hearing judge thus complied with the standards set forth by this Court before accepting Petitioner's guilty plea.

CONCLUSION

For the foregoing reasons, review of the Question Presented is not within the contemplation of Sup. Ct. R. 17.1, and Respondent thus prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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